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No.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

TIMOTHY SCOTT SHERMAN, PETITIONER

v.

STATE OF MARYLAND, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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QUESTION PRESENTED

In this criminal case, in which significant fact issues were raised at trial concerning physical aspects of the scene of the crime, a juror made an unauthorized and unsupervised midtrial visit to that location. Three state courts of last resort have held that such a site visit mandates automatic reversal as a matter of federal constitutional law. Many other courts have required the prosecution to rebut a heavy presumption of prejudice.

The question presented is whether the courts below erred by placing the burden on the defendant to show prejudice from the unauthorized site visit and reviewing the trial court's determination only for abuse of discretion.

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No.

TIMOTHY SCOTT SHERMAN, PETITIONER

v.

STATE OF MARYLAND, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

Timothy Scott Sherman respectfully petitions for a writ of certiorari to review the judgment of the Court of Special Appeals of Maryland in this case.

OPINION BELOW

The opinion of the Court of Special Appeals (App., infra, 1a-23a) is unreported.

JURISDICTION

The judgment of the Court of Special Appeals was entered on May 16, 1989. A petition for a writ of certiorari was denied by the Court of Appeals of Maryland on October 20, 1989 (App., infra, 24a-25a). A petition for reconsideration of the denial of certiorari was denied by the Court of Appeals of Maryland on January 10, 1990 (App., infra, 26a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law * * *."

STATEMENT

Petitioner Timothy Scott Sherman is a young man who had never been in any

trouble until the night, two months after his 18th birthday, when both his parents were murdered in their sleep by shotgun blasts. Although Timmy Sherman and many of the members of his immediate family, including the parents of his deceased mother, have steadfastly maintained Timmy's innocence, the State of Maryland, relying entirely on circumstantial evidence, prosecuted him for both murders and secured a guilty verdict from a jury. Petitioner was sentenced to two consecutive life terms and will, unless his conviction is overturned, spend all of his years from young adulthood well into middle age imprisoned for a terrible crime that there is very substantial reason to believe he did not commit.

Timmy Sherman stands as a convicted murderer even though the evidence at trial was entirely consistent with the

hypothesis of innocence; and even though it is undisputed that a member of the jury, unsatisfied with the evidence he was hearing at trial, chose during the course of the trial, but without disclosing his actions to the court or counsel, to conduct his own unauthorized, unsupervised investigation of the crime by visiting a site whose physical description played prominently in the contentions of the parties at trial. Such a site visit has been held, time and time again, to be a violation of the rights of a criminal defendant under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Nevertheless, after only the most cursory review of the point, and without requiring that the State do anything to rebut the presumption of prejudice that ordinarily accompanies such constitutional violations,

the trial and appellate courts below upheld the first-degree murder convictions and life sentences, saying nothing more than that the site visit was not "of such magnitude as to warrant a new trial." Tr. S64.

The decisions of many other state courts of last resort and federal courts of appeals make it abundantly clear that, if Timmy Sherman's case had arisen in those jurisdictions, his convictions would have been reversed on federal constitutional grounds. In at least three jurisdictions, the juror's unauthorized site visit would have led automatically to a reversal on federal constitutional grounds. In many others, the courts would have placed the burden on the prosecution to demonstrate that there was not a "reasonable possibility" or even "the slightest possibility" of prejudice, a

burden that the State in this case was not asked to meet, did not attempt to meet, was not found to have met, and could not possibly meet. Especially in light of the devastating consequences to a young man's life of the judgment of conviction and sentences in this case, the Court should grant certiorari to resolve the sharply conflicting interpretations of the Constitution that have been adopted by the court below and by other courts.

1. At approximately 1 a.m. on October 12, 1987, Elizabeth Ann Sherman and Stevenson Thomas Sherman were murdered in their bed by shotgun blasts. Eighteen-year-old Timmy Sherman, who was Elizabeth Ann Sherman's natural son and Stevenson Thomas Sherman's adopted son, discovered the bodies and awakened his maternal grandfather and nearby neighbor, William

Gibson, at approximately 1:30 a.m. Gibson described Timmy as "very much out of breath and upset." 4 Tr. 4. Gibson and Timmy returned to the Shermans' house, where Gibson checked the bodies and told Timmy his parents were dead. Timmy began to cry. 4 Tr. 6, 8. Gibson called other family members and the police. 4 Tr. 8, 14, 22-24.

In their investigation on the day of the murder, the police made two discoveries that formed the central features of the State's case against Timmy Sherman. 1/ A shotgun that appears to

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1/ The court below, quite incredibly, described the evidence against petitioner as "overwhelming." App., infra, 4a. Nevertheless, the court cited only three facts -- those discussed in the text and the presence of petitioner's fingerprints on the shotgun -- as constituting this "overwhelming" proof that Timmy Sherman, without motive, murdered his parents in cold blood. The (Cont'd)

have been the murder weapon was found in a pine tree on William Gibson's property. 4 Tr. 54. The State theorized that the location of the weapon pointed toward Timmy Sherman's guilt because he had used that tree as a hiding place in the past (App., infra, 5a), even though the evi-

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fingerprint evidence was not at all indicative of guilt because petitioner had used the shotgun for hunting as recently as the day before the murders (5 Tr. 41-46, 8 Tr. 87-88), and the prints on the gun could date from days or months before the murders (8 Tr. 21). As the FBI fingerprint expert admitted at trial, another person could have used the gun without leaving prints by, for example, wearing gloves. 8 Tr. 23-26. The State also succeeded at trial in admitting other evidence for use against Timmy Sherman, but the court below ruled much of that evidence irrelevant and inadmissible under state law. App., infra, 2a-4a. The remaining prosecution evidence -- for example, evidence that Timmy Sherman, an avid hunter, had recently purchased ammunition not matching that used in the murder (see id. at 19a-20a) -- was of no more than marginal probative value.

dence clearly showed that the tree was a well-known hiding place used by others in the neighborhood (9 Tr. 79-80). In addition, the police discovered beneath the mattress of Timmy Sherman's bed a box of shotgun shells matching those used to commit the crime. 6 Tr. 61-62.

Those two facts were vital to the State's case because virtually all of the other evidence one would normally expect in a murder case was absent. There was no evidence of friction between Timmy Sherman and his parents or other motive for the murders. No witnesses heard shots or saw any activity bearing on the crime. Several people in addition to Timmy had access to the house in which the victims were shot. 3 Tr. 139-140; 5 Tr. 112-113, 118.

Most important, on the night of the shooting, police called to the scene

tested Timmy Sherman's hands for gunpowder residue, and none was found, despite the heavy accumulations of residue at the scene. 4 Tr. 104-105; 6 Tr. 15-22; 7 Tr. 11; 10 Tr. 71. Although a neutron activation test was conducted and analyzed by the FBI, the FBI agent called by the State testified unequivocally that "the amounts of antimony and barium present * * * are insignificant, and therefore, it could not be determined if the person from whom the swabs were taken had discharged a firearm or been in the environment of shotgun primer residue." 7 Tr. 11. Thus, Timmy Sherman, supposedly a double shotgun murderer, showed none of the physical signs one would ordinarily find in the immediate aftermath of the murder. Lacking such evidence, the State asked the jury to resolve the conflicting evidence by placing weight on the discov-

ery of the gun in the pine tree and the shotgun shells beneath the mattress.

In addition, each of the two pieces of circumstantial evidence that were central to the State's case was problematic. There is nothing in the record, beyond the bare location of the box of shells, to establish that it was Timmy Sherman who placed the box beneath his mattress. Immediately after Timmy reported the shots to his grandfather, the house filled with family members and police officers. 4 Tr. 92-98. The murderer easily could have planted the box of shells at any time between the shooting and the discovery of the shells several hours later. And the box of shells was never tested for fingerprints, so the State neither proved that Timmy Sherman ever touched the box nor inquired whether anyone else did.

Because the bare discovery of the shotgun shells was so inconclusive, the gun in the tree became a truly vital part of the State's case. Yet the jury, if it wished to credit that evidence as probative of Timmy Sherman's guilt, had to consider physical aspects of the tree bearing on whether it would have been possible for Timmy Sherman to put the gun there. Undisputed testimony at trial concerning the position of the gun in the pine tree, by Police Corporal Edward Hopkins (one of the State's witnesses), showed that the gun had been pushed into the tree with "force." 6 Tr. 114. In fact, it took two officers working together to get the gun out of the tree. 6 Tr. 118. Hopkins admitted, "With my size and stature, I would have had difficulty putting the gun inside the tree in the condition I found it." 6 Tr. 115.

Hopkins was six feet tall, weighed 210, and worked out regularly. 6 Tr. 116. By contrast, Timmy Sherman weighs about 130 pounds. 6 Tr. 116-117. In addition, there were no signs of pine needles or pine tar on Timmy, as might have been expected if Timmy had been the one who hid the gun in the tree. 6 Tr. 117-118.

Thus, one of the most serious unresolved mysteries in the State's case was how Timmy Sherman, if he was the murderer, could have placed the shotgun in the tree despite his slight build and the absence of any evidence of contact with the tree. The prosecutor found this issue so serious that he spent considerable time on the subject in his redirect examination of Corporal Hopkins. 6 Tr. 141-143. During closing arguments, both sides argued the issue. 12 Tr. 35-36, 58-60, 78, 105.

2. Unbeknownst to the court and the parties, one member of the jury decided that there was a need to obtain more evidence about the tree than the State had chosen, or the defense had been permitted, [2/] to introduce. After he was sworn in as a juror but before the trial concluded, Blaine Miller, accompanied by his wife, "went to the Sherman house and then * * * drove back the streets from the Sherman house, back to the entrance of Gibson Manor in looking for a tree that was so involved in the case." Tr. S16. Miller saw the house and the tree. Tr. S16-S17.

The jury eventually returned a guilty verdict. After the verdict, but

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[2/] The trial court denied a pretrial defense motion to permit a supervised visit by the jury to the scene of the crime. See Tr. M75, S63-S64.

shortly before sentencing, Miller contacted defense counsel (Tr. S19-S20) and disclosed his unauthorized site visit for the first time. Counsel introduced evidence of the visit in support of a motion for a new trial. In the hearing on that motion, the trial court did not permit questioning about why Miller found it necessary to make the visit or what effect it had had on his deliberations. Tr. S17-S19. [3/] In particular, the court refused to permit evidence relating to why Miller found a site visit necessary on top of the numerous photographs of the scene shown at trial. Tr. S36. [4/] In

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3/ The court instead suggested that Miller "discuss [his] thought processes * * * with an attorney, with a friend, with a therapist." Tr. S34.

4/ Partly as a result of that exclusionary ruling, the record is less than crystal clear as to the timing (Cont'd)

response to the State's cross-examination questions, however, Miller made it clear that he felt he needed more information about the tree than was available from a videotape and photographs that were introduced at trial: "the tree had been in question, and that's one of the reasons why I went there" (Tr. S26); "the reason why I went there was so I could see the tree that was so much in question" (ibid.).

3. Defense counsel argued to the trial court that the site visit by juror Miller violated Timmy Sherman's Sixth

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of Miller's visit to the scene of the crime. Miller testified twice that it occurred two or three days into the trial (Tr. S16, S25). He also testified unequivocally that it occurred after a videotape of the Sherman house had been shown at trial (Tr. S25). He testified that the visit occurred after some photographs had been introduced at trial, but he was unsure about others (Tr. S26).

Amendment rights and justified a new trial. Tr. S58. The court disagreed. Its entire ruling was as follows (Tr. S63-S64):

> As to the matter of Mr. Miller going to the scene, the Defendant had requested a view of the property. My recall of it, I think the record will reflect, what was, in fact, said, was that I believe that it could be dealt with adequately without a view and that that request could be renewed after we had the evidence, the photographic evidence in place. I was satisfied with the videotapes, the photographs, including the aerial photographs, and the description of witnesses that the issue of the scene had been completely covered, and that there was no need for a view as to that issue. In suggesting a view, Counsel had -- Counsel's suggestions were not only the exterior, I think at one point that they were emphasizing the size of the rooms, the close proximity of the Defendant's room to his parents' room, and so that the inside of the house was part of what they were seeking a view as well as the exterior. So there's no question that Mr. Miller had violated instructions which were given about not doing his own investigation. However, I'm convinced that I denied the view, not because I felt that any significant information would come about, but I felt it would be a waste

> of time and expense to take the jury out there because I felt the issue was fully covered. So that I think that that activity is not of such magnitude as to warrant a new trial or reversible appeal [sic].

Thus, the court denied the defense motion without ever acknowledging that a constitutional violation had occurred or demanding of the State any showing at all to rebut the presumption of prejudice that arises when a juror makes an unauthorized visit to the scene of a crime. The court took no account of the obvious fact that juror Miller felt that there was something significant to be learned by visiting the scene of the crime and seeing the "tree that was so involved in the case." Tr. S16. Instead, the court relied entirely on its own pretrial thought processes in deciding that a site visit somehow did not matter.

On appeal, petitioner argued that his Fourteenth Amendment due process rights as well as his Sixth Amendment rights were violated by juror Miller's site visit. Nevertheless, the Court of Special Appeals, in rejecting petitioner's contention (App., infra, 15a-16a), cited only a civil case in which the Maryland Court of Appeals specifically "reject[ed] the rule which presumes prejudice." Wernsing v. General Motors Corp., 298 Md. 406, 416, 470 A.2d 802, 807 (1984). Having thus placed the burden squarely on petitioner to prove prejudice, rather than on the State to rebut it, the Court of Special Appeals "perceive[d] no abuse of discretion" in the trial court's ruling "that a new trial was not warranted, particularly in light of the numerous testimonial references, videotapes, and photographs relating to

and depicting the crime scene." App., infra, 16a. Thus, at no stage of these proceedings has the State been called on to rebut any presumption of prejudice arising from juror Miller's unauthorzied and unsupervised inspection of the crime scene.

The Court of Special Appeals rejected several other contentions of error and, although it also found several errors, deemed them harmless. It therefore affirmed the convictions. App., infra, 1a-23a. The Court of Appeals denied discretionary review (id. at 24a-25a).

REASONS FOR GRANTING THE PETITION

Timmy Sherman stands convicted of the first-degree murders of his own parents, despite substantial reason to doubt that he in fact committed those of-

fenses. This conviction rests not solely on the evidence that was presented at trial and subjected to cross-examination and other safeguards of the adversary process, but on the basis of that evidence supplemented by the un-cross-examined, unsupervised, unauthorized procurement of information by juror Blaine Miller through his own investigation. Although the courts below did not even acknowledge that Miller's site visit amounted to a deprivation of Timmy Sherman's federal constitutional rights, in fact there can be no doubt that such an escapade violates the defendant's federal rights of confrontation, cross-examination, assistance of counsel, trial by an impartial jury, and due process. "In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evi-

dence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." Turner v. Louisiana, 379 U.S. 466, 472-473 (1965) (quoting Irvin v. Dowd, 366 U.S. 717, 722 (1961)). 5/

5/ The cases finding a violation of those federal constitutional rights by a juror's visit to the scene of the crime are numerous, and the cases stating more generally that the jury's receipt of any extraneous evidence violates those rights are legion. Examples of the former include Gafford v. Warden, 434 F.2d 318 (10th Cir. 1970); Watkins v. State, 237 Ga. 678, 684, 229 S.E.2d 465, 470 (1976); People v. DeLucia, 20 N.Y.2d 275, 282 N.Y.S.2d 526, 229 N.E.2d 211 (1967); Commonwealth v. Price, 463 Pa. 200, 344 A.2d 493 (1975); Elisovsky v. State, 592 P.2d 1221, 1223 n.3 (Alaska 1979) (Boochever, J.); People v. Holmes, 69 Ill. 2d 507, 372 N.E.2d 656 (1978); State v. Durr, 343 So. 2d 1004, 1007 (La. 1977) (Tate, J., (Cont'd)

The real question in this case is not whether Timmy Sherman's federal constitutional rights were violated -- they indisputably were -- but whether the state courts conformed to federal consti-

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dissenting), vacated sub nom. Durr v. Cook, 589 F.2d 891 (5th Cir. 1979); and People v. Hollingsworth, 22 Mich. App. 545, 177 N.W.2d 687 (1970). See also Goff v. Kinzle, 148 Mont. 61, 66, 417 P.2d 105, 108 (1966) ("a party could hardly be said to have a trial by jury as the term is understood in American jurisprudence, if each juror were permitted to make an independent investigation of the facts").

Examples of the latter include Parker v. Gladden, 385 U.S. 363, 364-365 (1966); Turner v. Louisiana, supra; Patterson v. Colorado, 205 U.S. 454, 462 (1907); Dickson v. Sullivan, 849 F.2d 403, 406 (9th Cir. 1988); United States v. Perkins, 748 F.2d 1519, 1533-1534 (11th Cir. 1984); Owen v. Duckworth, 727 F.2d 643, 645-646 (7th Cir. 1984); Llewellyn v. Stynchcombe, 609 F.2d 194, 195-196 (5th Cir. 1980); Bulger v. McClay, 575 F.2d 407 (2d Cir.), cert. denied, 439 U.S. 915 (1978); Government of the Virgin Islands v. Gereau, 523 F.2d 140, 150-151 (3d Cir. 1975), cert. denied, 424 U.S.

(Cont'd)

tutional standards in holding that the error did not require reversal. The courts below placed the burden on Timmy Sherman to prove prejudice and, with virtually no explanation, ruled that he had not met that burden. Although a few other courts have likewise placed the burden of proving prejudice on the defendant, numerous courts have construed the Constitution quite differently -- and properly so -- to erect a presumption that juror misconduct of this sort is prejudicial. Three courts make that

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917 (1976); United States ex rel. Owen v. McMann, 435 F.2d 813 (2d Cir. 1970) (Friendly, J.), cert. denied, 402 U.S. 906 (1971); State v. Poland, 132 Ariz. 269, 282, 645 P.2d 784, 797 (1982), aff'd on other grounds, 476 U.S. 147 (1986); State v. Sinegal, 393 So. 2d 684, 686-687 (La. 1981); State v. Cox, 322 N.W.2d 555 (Minn. 1982); Barker v. State, 95 Nev. 309, 312-313, 594 P.2d 719, 721 (1979); and State v. Poh, 116 Wis. 2d 510, 525-526, 343 N.W.2d 108, 117 (Wis. 1984).

presumption irrebuttable. Others allow rebuttal, but here the State did nothing to rebut the presumption of prejudice. Thus, the decision below conflicts with numerous other decisions on an important and recurring issue. In light of the frequency with which the issue arises, and the severe consequences to a young man if the conviction is allowed to stand, this Court should grant certiorari.

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF SEVERAL STATE COURTS OF LAST RESORT THAT CONSTRUE THE FEDERAL CONSTITUTION TO REQUIRE AUTOMATIC REVERSAL WHEN A JUROR CONDUCTS AN UNSUPERVISED VISIT TO THE SCENE OF THE CRIME

"Several courts have found that unauthorized views of the scene of the crime by even one juror necessarily con-

stitute prejudice sufficient for a new trial." Elisovsky v. State, 592 P.2d 1221, 1223 n.3 (Alaska 1979). The leading case so holding is People v. DeLucia, 20 N.Y.2d 275, 282 N.Y.S.2d 526, 229 N.E.2d 211 (1967).

In DeLucia, the New York Court of Appeals recognized that, under Parker v. Gladden, 385 U.S. 363 (1966), the receipt of extraneous evidence by jurors violates a defendant's rights under the Confrontation Clause of the Sixth Amendment; and the court held that a site visit by a juror is just the kind of receipt of extraneous evidence that implicates such constitutional rights. 20 N.Y.2d at 279, 282 N.Y.S.2d at 530, 229 N.E.2d at 214. The court also held, presumably in light of the self-evident fact that a juror's independent investigation shows that he found additional information necessary to

make up his mind, that such site visits are always prejudicial: "[P]roof of the fact of the unauthorized visit is sufficient to warrant a new trial without proof of how such visit may have influenced individual jurors in their juryroom deliberations. Such a visit, in and of itself, constitutes inherent prejudice to the defendants." Ibid. The New York Court of Appeals has subsequently confirmed the per se nature of the DeLucia rule. In People v. Crimmins, 26 N.Y.2d 319, 310 N.Y.S.2d 300, 258 N.E.2d 708 (1970), the court reiterated and emphasized the above-quoted language from DeLucia. It added: "Although the affidavit [in DeLucia] averred that the jurors had re-enacted the crime, we did not predicate our decision on actual prejudice." 26 N.Y.2d at 323, 310 N.Y.S.2d at 302, 258 N.E.2d at 710. See also Alford

v. Sventek, 53 N.Y.2d 743, 745, 439 N.Y.S.2d 339, 341, 421 N.E.2d 831, 833 (1981) ("we have held that an unauthorized visit to the scene of a crime is inherently prejudicial in a criminal matter").

Quite simply, had Timmy Sherman's trial taken place in New York, his conviction would have been reversed on federal constitutional grounds. That fact alone makes a grant of certiorari appropriate because the court below "has decided a federal question in a way that conflicts with the decision of another state court of last resort." Sup. Ct. R. 10.1(b). 6/

6/ When a state intermediate appellate court has rendered a decision on a federal issue and the State's highest court has denied review, the intermediate court's decision is deemed that of "the highest court of a State in which decision could be

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But there is much more. The Supreme Court of Georgia follows the same approach as New York. In another case involving a visit by jurors to the scene of the crime, the court, citing DeLucia, stated that "the two jurors * * * became, in a real sense, unsworn witnesses against the appellant in violation of the Sixth Amendment." Watkins v. State, 237 Ga. 678, 684, 229 S.E.2d 465, 470 (1976). "This misconduct cannot be ignored and requires a reversal of the judgment based on the jury's verdict in

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had" within the meaning of 28 U.S.C. § 1257(a). See, e.g., Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 160 (1954). Presumably, the same rule of construction applies to Rule 10.1(b). Thus, on at least one recent occasion, this Court has granted certiorari to review a decision of the Maryland Court of Special Appeals in order "to resolve a conflict among the state courts." Maryland v. Macon, 472 U.S. 463, 465 (1985).

this case." Id. at 685, 229 S.E.2d at 470-471. In Georgia, as in New York, Timmy Sherman's conviction would have been reversed on federal constitutional grounds.

So too in Pennsylvania. The highest court of that State has deemed it unnecessary "to decide * * * whether every unauthorized view by a juror constitutes reversible error," because prejudice is found whenever "significant issues were raised at trial concerning the physical aspects of the areas visited by the juror." Commonwealth v. Price, 463 Pa. 200, 203-204, 344 A.2d 493, 494 (1975). The Price rule, like the DeLucia/Watkins rule, is explicitly based on the Sixth Amendment. See Commonwealth v. Frazier, 471 Pa. 121, 129, 369 A.2d 1224, 1228 (1977) (Price based on Sixth Amendment right to impartial jury). Because sig-

nificant issues were raised at trial about the physical aspects of the tree visited by juror Miller -- in his own words "the tree that was so much in question" (Tr. S26) -- the Price rule of automatic reversal would have been applied in Pennsylvania. The decision below thus conflicts with Price. See also State v. Durr, 343 So. 2d 1004, 1007 (La. 1977) (Tate, J., dissenting) (discussing DeLucia's automatic reversal rule with approval), vacated sub nom. Durr v. Cook, 589 F.2d 891 (5th Cir. 1979); People v. Hollingsworth, 22 Mich. App. 545, 177 N.W.2d 687 (1970). 7/

7/ Many courts have adopted similar rules as a matter of common law (sometimes in civil as well as criminal cases), obviating the necessity of resort to the Federal Constitution. See, e.g., United States v. Salentine, 27 F. Cas. 927 (E.D. Wis. 1879) (No. 16,213); State v. Baker, 224 Kan. 474, 477, 580 P.2d 1345, (Cont'd)

The decisions in DeLucia, Watkins, and Price have much to recommend them. Because it will generally be true -- as it was here (see p. 16, supra) -- that inquiry into the deliberative process of the jurors will be prohibited under rules analogous to Fed. R. Evid. 606(b), and because jurors will often be unable to offer a reliable explanation isolating the effect that particular information had on the totality of their judgments in any event, it will rarely be knowable what effect an unauthorized site visit has on jury deliberations. But the visit

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1349 (1978); Schmiz v. Illinois Central Gulf Railroad, 546 So. 2d 693, 698 (Miss. 1989); Middleton v. Kansas City Public Service Co., 348 Mo. 107, 152 S.W.2d 154 (1941); Pendleton v. State, 734 P.2d 693 (Nev. 1987); Sanders v. Curry County, 253 Or. 578, 456 P.2d 493 (1969); Schneider v. Moe, 151 Or. 353, 50 P.2d 577 (1935); State v. Ahrens, 25 Utah 2d 222, 225, 479 P.2d 786, 787-788 (1971).

speaks for itself: a juror who goes outside the adversarial process to gather evidence necessarily is looking for something to help him make up his mind. Thus, as the Fifth Circuit stated (in a case involving not a site visit but a different kind of extraneous jury influence), "[i]f the trial judge finds that the jury had before it prejudicial material, the inquiry is complete and the conviction must be reversed." United States v. Renteria, 625 F.2d 1279, 1284 (1980).

This Court should adopt, as a matter of federal constitutional law, the rule that an unauthorized visit by a juror to a crime scene whose physical description is in issue automatically mandates rever-

sal. 8/ Because the decision below conflicts with that rule, certiorari should be granted, and the judgment below should be reversed.

II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF NUMEROUS FEDERAL COURTS OF APPEALS AND STATE COURTS OF LAST RESORT THAT CONSTRUE THE FEDERAL CONSTITUTION TO REQUIRE THE PROSECUTION TO OVERCOME A HEAVY PRESUMPTION OF PREJUDICE FROM THE EXPOSURE OF JURORS TO EXTRINSIC EVIDENCE

Even if this Court were unprepared to agree with the highest courts of New York, Georgia, and Pennsylvania that reversal should be automatic in cases of this sort, it is elementary that, once

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8/ There is no need to consider the broader formulation of the rule by the New York and Georgia courts because the narrower Pennsylvania formulation clearly applies to the facts of this case.

constitutional error is shown, the burden shifts to the prosecution to demonstrate the harmlessness of that error beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967). Constitutional error was indisputably shown in this case, yet the burden was placed on the defendant to show prejudice from the error, not on the State to rebut it. That erroneous placement of the burden of proof conflicts not only with the most basic principles of Chapman, but also with scores of decisions specifically requiring the prosecution to meet a heavy burden of rebutting prejudice from extraneous influences on criminal juries. 9/

9/ As a practical matter, the placement of the burden of proof is of vital importance to the outcome of this case. The contested issue -- whether Timmy Sherman could have placed the shotgun in the pine tree where it was found -- was central to

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The vast majority of courts hold that the introduction of extraneous information into jury deliberations creates a presumption of prejudice that the prosecution must overcome. Outside the constitutional context, this Court has held that "any private * * * contact * * * with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial," and "the burden rests heavily upon the Government to establish * * * that such contact with the juror was harmless to the defendant." Remmer

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the jury's determination of guilt or innocence. Even if the existence of other evidence showing the condition of the tree made it possible for the courts to determine that petitioner had not affirmatively demonstrated prejudice, it is inconceivable, in a case as close as this one, that anyone could conclude that the State had disproved prejudice from juror Miller's supplementation of that evidence at trial.

v. United States, 347 U.S. 227, 229 (1954); see also Remmer v. United States, 350 U.S. 377 (1956). And the lower courts have held the presumption of prejudice and heavy burden applicable as a matter of constitutional law to many other cases involving jurors' receipt of extrinsic information. 10/ There is some variation among the lower courts in their

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10/ See, e.g., Dickson v. Sullivan, 849 F.2d 403, 405 (9th Cir. 1988) (Wallace, J.); United States v. Butler, 822 F.2d 1191, 1195-1196 & n.2 (D.C. Cir. 1987) (Bork, J.); United States v. Williams, 809 F.2d 75, 81 (1st Cir. 1986), cert. denied, 481 U.S. 1030 (1987); United States v. Littlefield, 752 F.2d 1429, 1431-1432 (9th Cir. 1985); United States v. Perkins, 748 F.2d 1519, 1533-1534 (11th Cir. 1984); Owen v. Duckworth, 727 F.2d 643, 646 (7th Cir. 1984); Durr v. Cook, 589 F.2d 891, 894 n.3 (5th Cir. 1979); State v. Sinegal, 393 So. 2d 684, 687 (La. 1981); State v. Cox, 322 N.W.2d 555, 558 (Minn. 1982); State v. Poh, 116 Wis. 2d 510, 525-526, 343 N.W.2d 108, 117 (1984).

description of just how heavy the prosecution's burden of rebuttal is, but both of the leading standards would have mandated reversal in this case.

Some courts, following the lead of Judge Friendly, have held that even "the slightest possibility" of prejudice from an extraneous jury influence requires reversal. As Judge Friendly wrote, "the principle that the jury may consider only matter that has been received in evidence is so fundamental that a breach of it should not be condoned if there is the slightest possibility that harm could have resulted." United States v. Adams, 385 F.2d 548, 550-551 (2d Cir. 1967). The D.C. Circuit has quoted Judge Friendly and applied his standard. Dallago v. United States, 427 F.2d 546, 560 & n.58 (1969). Likewise, the Tenth Circuit has held that -- even on habeas

corpus review of a state conviction -- the proper standard is that, "if there is the slightest possibility that harm could have resulted from the jury's viewing of unadmitted evidence, then reversal is mandatory." Johnston v. Makowski, 823 F.2d 387, 390 (10th Cir. 1987), cert. denied, 484 U.S. 1026 (1988). See also Wiser v. People, 732 P.2d 1139, 1142 n.5 (Colo. 1987) (noting use of "slightest possibility" standard in these three circuits); State v. Poh, 116 Wis. 2d 510, 527, 343 N.W.2d 108, 117 (1984) (same); Crockett v. Commonwealth, 187 Va. 687, 700-707, 47 S.E.2d 377, 383-387 (1948) (as a matter of common law, State has burden to rebut presumption of prejudice and only "slight" evidence of prejudice is needed to justify new trial). There was, of course, considerably more than "the slightest possibility" that juror

Miller's investigation of the physical state of the tree led to his vote to convict Timmy Sherman. The judgment of conviction therefore would have been reversed if this case had arisen in the D.C., Second, or Tenth Circuit.

Other courts, led by the Ninth Circuit, have held that the proper standard is that "the appellant is entitled to a new trial if there existed a reasonable possibility that the extrinsic material could have affected the verdict." United States v. Vasquez, 597 F.2d 192, 193 (9th Cir. 1979) (emphasis added). That standard is deemed equivalent to the Chapman standard and is applied on federal habeas review of state convictions, as well as direct appeal of federal convictions, because the error of introducing extrinsic material into jury deliberations is of federal constitutional dimension.

Gibson v. Clanon, 633 F.2d 851, 853-855 & n.1 (9th Cir. 1980), cert. denied, 450 U.S. 1035 (1981). When state courts have fallen into the error of putting the burden on the defendant to show prejudice (rather than the State to rebut it), and reviewing the no-prejudice determination only for abuse of discretion, the Ninth Circuit has granted a writ of habeas corpus. Marino v. Vasquez, 812 F.2d 499, 504-507 (9th Cir. 1987). That is precisely what happened in this case, and the interpretation of the Federal Constitution below cannot be squared with that prevailing in the Ninth Circuit. 11/

11/ The Ninth Circuit has been unwavering in its vigorous application of the "reasonable possibility" or Chapman standard to review federal and state convictions alike. In addition to the cases already cited, see Dickson v. Sullivan, 849 F.2d 403 (9th Cir. 1988) (Wallace, J.) (granting habeas corpus relief);
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The Ninth Circuit standard prevails in many other courts as well. For example, a panel of the Seventh Circuit, citing the constitutional nature of the rights at stake when a jury considers extrinsic evidence, endorsed the "reasonable possibility" and Chapman standards in United States v. Bruscino, 662 F.2d 450, 457-459 (1981). The en banc court disagreed with the way that the panel applied those standards, but it explicitly agreed with the panel that "reasonable

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United States v. Hernandez-Escarsega, 886 F.2d 1560, 1579-1581 (9th Cir. 1989), petition for cert. pending, No. 89-1413; Bayramoglu v. Estelle, 806 F.2d 880, 887 (9th Cir. 1986); United States v. Tebha, 770 F.2d 1454, 1456 (9th Cir. 1985); United States v. Bagnariol, 665 F.2d 877, 883-889 & n.6 (9th Cir. 1981), cert. denied, 456 U.S. 962 (1982); United States v. Bagley, 641 F.2d 1235, 1240-1241 (9th Cir.), cert. denied, 454 U.S. 942 (1981); see also United States v. Littlefield, 752 F.2d 1429, 1431-1432 (9th Cir. 1985).

possibility" is the correct standard. United States v. Bruscino, 687 F.2d 938, 940 (1982), cert. denied, 459 U.S. 1211 (1983). At least five other circuits, besides the Seventh and Ninth, employ that standard. 12/

Numerous state courts likewise employ the "reasonable possibility" test

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12/ See United States v. Cheyenne, 855 F.2d 566, 568 (8th Cir. 1988); United States v. Greene, 834 F.2d 86, 88-89 (4th Cir. 1987); United States v. Williams, 809 F.2d 75, 81 (1st Cir. 1986), cert. denied, 481 U.S. 1030 (1987); United States v. Perkins, 748 F.2d 1519, 1533-1534 (11th Cir. 1984); United States v. Barnes, 747 F.2d 246, 249-251 (4th Cir. 1984); United States v. Delaney, 732 F.2d 639, 641-642 (8th Cir. 1984); Llewellyn v. Stynchcombe, 609 F.2d 194, 195-196 (5th Cir. 1980); see also, e.g., Stephens v. South Atlantic Canners, Inc., 848 F.2d 484, 485-489 (4th Cir.) (holding that presumption of prejudice and "reasonable possibility" standard apply even in civil cases), cert. denied, 109 S. Ct. 564 (1988); Haley v. Blue Ridge Transfer Co., 802 F.2d 1532 (4th Cir. 1986) (same).

and place the burden of rebutting prejudice on the State, as a matter of federal constitutional law. For example, in State v. Sinegal, 393 So. 2d 684 (La. 1981), the Supreme Court of Louisiana reversed a conviction because of extrinsic information that was obtained by a juror. Citing various federal cases, the court noted that "[i]t is essential that all facts considered by the jury are produced in the courtroom with full protection of defendant's rights to confrontation and due process" (id. at 686-687) and that, "[i]f there is a reasonable possibility that extraneous information considered by the jury affected its verdict, a new trial is mandated" (id. at 687). Accord State v. Graham, 422 So. 2d 123, 131-132 (La. 1982), appeal dismissed, 461 U.S. 960 (1983). Likewise, in State v. Poh, 116 Wis. 2d 510, 343

N.W.2d 108 (1984), the Supreme Court of Wisconsin held that it was proper to reverse a conviction because of the "reasonable possibility" that a juror's action in bringing extraneous information to the jury room prejudiced the defendant. The court explicitly noted that this is the proper standard for juror-initiated misconduct as well as outside influence on the jury. Id. at 527 n.16, 343 N.W.2d at 118 n.16. The court also expressly stated that the Chapman standard is proper because of the federal constitutional nature of the rights involved. Id. at 524-529, 343 N.W.2d at 116-118. Other cases, also explicitly grounded in the Federal Constitution, are in accord. 13/

13/ See State v. Poland, 132 Ariz. 269, 282-283, 645 P.2d 784, 797-798 (1982), aff'd on other grounds, 476

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The "reasonable possibility" test was not applied below. Instead, petitioner was required to shoulder the burden of showing actual prejudice. 14/ According to at least seven federal

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U.S. 147 (1986); State v. Glover, 159 Ariz. 291, 293-294, 767 P.2d 12, 15 (1988); In re Stankewitz, 40 Cal. 3d 391, 402-403, 220 Cal. Rptr. 382, 388, 708 P.2d 1260, 1266 (1985); Wiser v. People, 732 P.2d 1139, 1141-1143 (Colo. 1987); State v. Cox, 322 N.W.2d 555, 558 (Minn. 1982); Barker v. State, 95 Nev. 309, 313, 594 P.2d 719, 721 (1979); see also State v. Bell, 225 Mont. 83, 92-93, 731 P.2d 336, 341-342 (1987) (as a matter of common law, prejudice from improper site visit is presumed and must be rebutted by State).

14/ Moreover, the trial court pretermitted any realistic opportunity to show prejudice. Counsel were permitted to establish only the bare fact of the site visit (Tr. S17-S19, S36). When it came to making the prejudice determination, the trial court relied entirely on its own perception of what a site visit would add to the evidence at trial -- i.e., that it would be "a waste of time and expense." Tr. S64. Juror Miller obviously had a differ-
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courts of appeals and seven state courts of last resort, that is error of constitutional dimension. Moreover, had the proper standards been applied, Timmy Sherman's conviction would have had to be reversed. The State relied on only two pieces of circumstantial evidence, and the juror's investigation went to the heart of one of those two pieces of evidence. The burden of rebutting the presumption of prejudice should have rested on the State, but the State was not even

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ent perception, but the court -- which was supposed to be determining the impact of the extraneous influence on the jury -- completely ignored that question and instead harkened back to its own reasons for thinking a site visit unnecessary. The fact of the matter is that the trial court made no actual determination of the impact of the site visit on the jury under any standard, let alone under the proper standard that presumes prejudice and requires the prosecution to show otherwise.

called on to show that the juror's independent investigation was not prejudicial. All the State did was point to the fact that some photographs and videotapes of the pine tree were introduced at trial. But the defect in that "showing" is obvious: if juror Miller had been satisfied with that evidence, he would not have undertaken his own investigation. Because juror Miller was not permitted to testify about why he undertook that investigation, the State certainly has not rebutted the presumption that he was dissatisfied with the evidence presented at trial and instead relied on the extrajudicial evidence.

Indeed, the ruling below that the unauthorized site visit was inconsequential, because it related to a subject that was much explored at trial, is perverse. In a case in which little evi-

dence has been admitted at trial bearing on the same subject as the site visit, it is unlikely that the site visit relates to a central issue; on the other hand, the presentation by counsel of a large amount of evidence demonstrates the importance of the issue and thus the heightened need for ensuring that the jury considers only properly admitted evidence. Under the reasoning of the court below, however, the more important the issue that the juror independently investigates, the less likely reversal will be. That cannot be the correct rule.

Notwithstanding the clear position of the vast majority of the federal courts of appeals requiring the prosecution to shoulder a heavy burden of rebutting the presumption of prejudice when the jury has been exposed to extraneous

influences, one federal court of appeals and a number of state courts, in addition to the court below, persist in requiring the defendant to prove prejudice. In United States v. Pennell, 737 F.2d 521, 530-534 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985), for example, a divided panel of the Sixth Circuit held that, following Smith v. Phillips, 455 U.S. 209 (1982), there is no longer a presumption of prejudice from extraneous influences on the jury, and the burden is on the defendant to show prejudice. See also United States v. Griffith, 756 F.2d 1244, 1251-1252 (6th Cir.), cert. denied, 474 U.S. 837 (1985). 15/ Likewise, in a

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15/ Pennell has been explicitly rejected by several other circuits. See United States v. Butler, 822 F.2d 1191, 1195-1196 n.2 (D.C. Cir. 1987) (Bork, J.); United States v. Littlefield, 752 F.2d 1429, 1431-1432 (9th Cir. 1985); see also Abell v. (Cont'd)

recent case specifically involving unauthorized site visits by jurors, the Supreme Court of Nebraska has placed the burden squarely on the defendant to show that he was prejudiced. State v. Woodward, 210 Neb. 740, 316 N.W.2d 759 (1982). Other state courts have done likewise in site visit cases. 16/ Thus, the decision below, while plainly wrong,

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Potomac Insurance Co., 858 F.2d 1104, 1146 & n.50 (5th Cir. 1988), vacated on other grounds sub nom. Fryar v. Abell, 109 S. Ct. 3236 (1989). The Fourth Circuit has been unable to formulate a consistent position. Compare Stockton v. Virginia, 852 F.2d 740, 744 (4th Cir. 1988) (explicitly rejecting Pennell), cert. denied, 109 S. Ct. 1354 (1989), with United States v. Malloy, 758 F.2d 979, 982 & n.6 (4th Cir.) (following Pennell), cert. denied, 474 U.S. 1009 (1985).

16/ See State v. Little, 164 N.W.2d 81 (Iowa 1969); State v. Boggan, 133 N.C. 761, 46 S.E. 111 (1903); State v. Smith, 13 N.C. App. 583, 186 S.E.2d 600, cert. denied, 281 N.C. 157, 187 S.E.2d 586 (1972).

is by no means an isolated and nonrecurring departure from the constitutional standards that require placement of the burden of proof on the prosecution.

Because the conflict between the decision below and many other decisions is stark, and the problem is a recurring one, the Court should grant certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1990

APPENDIX A

UNREPORTED

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1491

SEPTEMBER TERM, 1988

TIMOTHY SCOTT SHERMAN

v.

STATE OF MARYLAND

Gilbert, C.J.
Bishop,
Wenner,

JJ.

PER CURIAM

Filed: May 16, 1989

Timothy Scott Sherman was convicted by a jury in the Circuit Court for Harford County (Whitfill, J.) of the shotgun murders of his parents. Sherman was sentenced to two consecutive life sentences.

In his appeal to this Court, Sherman raises a virtual multitude of issues for our review. We shall discuss them in the order posited to us by Sherman, supplying whatever factual predicate is needed to understand the point.

"I. Did the trial court commit reversible error in admitting the prosecution's state of mind evidence?"

Over objection, Cynthia Benjel, a State's witness, testified that Sherman told her four months prior to his parents' deaths that he had seen his parents killed in an automobile accident." Sherman related to Ms. Benjel that he was traveling in the "car behind them, and

had seen their car hit and they were killed...." Another witness, Albert Unkart, told the court that Sherman made a similar remark to him ten days before the homicides. Sherman said that his "folks were killed in an auto accident in front of him." That testimony was presented to demonstrate Sherman's state of mind at the time of the double murder.

Sherman's statements to Unkart and Benjel were not offered for the truth of the matter asserted but were offered as circumstantial evidence of Sherman's state of mind at the time of the slayings. When declarations are simply the circumstantial predicate from which the state of mind may be inferred, they are deemed to be non-hearsay. Santoni v. Moodie, 53 Md. App. 129, 149-50 (1982).

We are convinced that Sherman's conversations with both Unkart and Benjel

were irrelevant. The remarks merely proved that Sherman lied when he stated that his parents were killed in an automobile accident. A rational inference that Sherman was contemplating the violent death of his parents cannot be drawn from the statements. Therefore, the trial judge erred in admitting the evidence.

Nevertheless, in light of the overwhelming evidence against Sherman, the error does not warrant reversal. That evidence against young Sherman included a box, designed to hold five 12-gauge shells yet containing just three, which was found beneath Sherman's bed. The three shells were identical to two shells that were found outside the bedroom of Sherman's parents. Additionally, deputies found a 12-gauge shotgun belonging to Sherman's parents hidden in a nearby

pine tree. Sherman had used that same pine tree to hide items since his childhood. An F.B.I. examination of the weapon disclosed that it had fired the two expended shells found in the hallway of the Sherman's home and that fingerprints on the weapon were those of Timothy Sherman. Sherman's parents were slain by a shotgun blast. Any error in this instance was harmless beyond a reasonable doubt. Dorsey v. State, 276 Md. 638 (1976).

Sherman also avers that the trial judge erred in excluding the testimony of Gail Robinson, appellant's aunt. Ms. Robinson was the sister of Sherman's mother, Ann. She was to testify as to a conversation she had with her sister Ann just several hours before Ann's death. Defense proffered that Ann had said that Sherman was "great" and had "gone to bed

without any problems." The testimony was offered to show Sherman's state of mind at the time of the murders. The court ruled that his testimony was inadmissible hearsay. Judge Whitfill was correct. The proffered evidence did not show Sherman's state of mind but rather that of his mother.

"II. Did the trial court commit reversible error by violating the appellant's constitutional right to due process and a fair trial in limiting the appellant's presentation of evidence to the jury?"

Sherman claims that he should have been allowed to cross-examine his paternal grandfather, Donald, in order to demonstrate the latter's discordant relationship with the murder victims. Judge Whitfill precluded Sherman's counsel from cross-examining the grandfather as to the following matters: 1) Mr. Sherman's claim against his son's estate for a fir-

ing pin assembly of a .22 rifle; 2) Mr. Sherman's refusal to provide his son and daughter-in-law with a wedding rehearsal dinner prior to their marriage; 3) Mr. Sherman's dealings regarding two pieces of family-owned property; 4) when Mr. Sherman last took his son, daughter-in-law, and grandson to dinner and when the murder victims last visited Mr. Sherman's home.

We think the questions to be no more than the proverbial "red herring" dragged across the trail in order to obfuscate the facts.

The right of cross-examination is not unlimited. Waldron v. State, 62 Md. App. 686, 696 (1985). The decision of whether to either allow or disallow questions on cross-examination is normally left to the sound discretion of the trial judge. Waldron at 696; Hopper v. State,

64 Md. App. 97, 1093 (1985). In the instant case Judge Whitfill properly exercised his discretion and excluded the defendant's fishing expedition.

Sherman next asserts that the trial judge erred in refusing to allow him to adduce testimony regarding the bias of Donald Sherman and other family members. The issue is not whether the family was biased against Ann and William [sic] Sherman, the murder victims, but whether Timothy committed the double slayings. The bias is, in the circumstances, totally irrelevant. Of course, we recognize that Sherman sought to direct the jury's attention from himself to his grandfather or other family members. That tactic, however, falls far short of shifting culpability to the grandfather.

"III. Did the trial court commit reversible error in excluding the testimony of Dr. Richard Streete, D.V.M., as both an expert and fact witness concerning the behavior of Rascal, the appellant's and decedents' family pet?"

Sherman maintains that the judge erred in prohibiting Dr. Richard Streete, a veterinarian, from testifying about the post-murder behavior of Rascal, the Sherman family dog.

The decision to admit or preclude expert testimony is vested in the sound discretion of the trial judge, and that decision will not be reversed in the absence of an abuse. Simmons v. State, 313 Md. 33, 43 (1988). Judge Whitfill, as we see it, did not abuse his discretion in finding that the psychological state of the Sherman's dog was irrelevant.

"IV. Did the trial court commit reversible error by violating the appellant's constitutional rights of due process and a fair trial by its failure both

to supply the appellant an unredacted copy of the grand jury testimony of Cpl. Jordan Watts and undisclosed witness statements?"

Sherman asseverates that the trial judge erroneously precluded him from examining all of Sergeant Jordan Watts's grand jury testimony. He also raises a similar complaint about Watts's police report.

As to Watts's police report, Sherman was given seven pages of the 45 page report and advised that the remaining 38 pages consisted of witnesses' statements. Sherman's counsel said that if Watts confirmed that the undisclosed 38 pages pertaining only to witnesses' statements "that's the end of it. I won't go into it." Watts confirmed the matter. Thus, any objection has since been waived by counsel. See Md. Rule 2-517.

With respect to Watts's grand jury testimony, the circuit court redacted those portions of that evidence where Watts was quoting statements of people who had been interviewed. The defense desired to examine the materials not for the purpose of cross-examination but rather to determine what others might have said about the case.

The Court of Appeals in Jones v. State, 297 Md. 7, 14-15 (1983), held that "once a State's witness has testified on direct examination, a defendant is entitled to inspect the grand jury testimony for cross-examination purposes ...." This Court in Ellison v. State, 56 Md. App. 567, 578-79 (1983), said that the right of inspection did not apply when the inspection was for purposes other than cross-examination. Ellison is dispositive of this argument.

"IV. Did the trial court commit reversible error when it violated the constitutional rights of the appellant by its failure to dismiss the indictments?"

Subsequent to the guilty verdict but prior to sentencing, Sherman's attorney was contacted by a member of the grand jury which returned the indictment in the instant case. The juror stated that, out of the panel of sixteen grand jurors, only eleven voted for an indictment. Sherman promptly requested a new trial. The request was denied by Judge Whitfill, who stated:

> "There are no reported votes of the Grand Jury. I found no law that says that it must be recorded, none has been cited to me, and I think that members of the Grand Jury coming forward and raising that after the fact is not sufficient to put the indictment in question. However, the case of State v. Vincent, 91 Md. 718 [1900], says that even if it were invalid, it was waived by having entered a plea to the merits going to trial."

State v. Vincent deals with a challenge to an indictment as a result of an insufficient number of persons constituting a grand jury. The statute under attack in Vincent was merely directory and "designed solely to secure the presence of a number sufficient for twelve to concur in an indictment. Vincent at 719. In Maryland, no man may be indicted by a grand jury consisting of less than twelve of his fellow citizens. In Re Report of Grand Jury, 152 Md. 616, 621 (1927).

The issue in the case at bar is whether twelve jurors voted for the indictment. One grand juror's post-trial allegation that the indictment was returned by less than twelve persons does not warrant a dismissal of the indictment. Sherman failed to meet the heavy

burden of showing that the indictment was handed up by less than the requisite number of grand jurors. Assuming without deciding that we are permitted to do so, without evidence showing clearly what transpired in the grand jury proceeding, we are unwilling to nullify a trial and vitiate an indictment.

Sherman further charges that the trial court should have dismissed the indictment because the prosecution withheld certain exculpatory evidence from the grand jury. The argument is devoid of any merit whatsoever; Sherman tilts at windmills. United States v. Mechanik, 475 U.S. 66, 70 (1986), is dispositive of the case. There, Justice Rehnquist, delivering the opinion of the Court, stated:

> "But the petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt. Measured by the petit jury's verdict, then, any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt." (Footnote omitted.)

"VI. Did the trial court commit reversible error by violating the appellant's constitutional rights of due process and a fair and impartial trial by not granting the appellant's motion for a new trial due to the consideration by a juror or extrinsic evidence and violation of the instructions of court?"

Sherman argues that the trial court should have granted a new trial because a juror and wife drove to the neighborhood of the murder scene.

When the precise extraneous matter is known but direct evidence as to its effect on the deliberations is not, "a sound balance is struck by a rule which looks to the probability of prejudice

from the fact of extraneous matter in relation to the circumstances of the particular case." Wernsing v. General Motors Corp., 298 Md. 406, 419-20 (1984). When ruling on a motion for new trial, the judge must evaluate the degree of probable prejudice to the defendant in order to discern whether a new trial is justified. Wernsing at 420.

The grant or denial of a motion for new trial rests within the sound discretion of the trial judge. Eades v. State, 75 Md. App. 411, 419-20 (1988). Judge Whitfill found that a new trial was not warranted, particularly in light of the numerous testimonial references, videotapes, and photographs relating to and depicting the crime scene. We perceive no abuse of discretion in that ruling.

Sherman next alleges that there was a violation of the sequestration order

because of the fact that the juror was accompanied by the juror's wife when he visited the crime scene. Sherman asserts that conduct mandates reversal. Sherman's bald averment fails to indicate how the juror's improper action prejudiced the case.

"VII. Did the trial court commit reversible error in not giving a manslaughter instruction to the jury and thereby prohibiting appellant's counsel the benefit of such argument to the jury?"

Sherman complains that the trial court erroneously declined to instruct the jury on the crime on manslaughter.

There is a four-pronged test used to determine whether a particular crime was manslaughter, namely:

"A. Was there an adequate provocation for the killing?

B. Was the killing done in the heat of passion?

C. Did the killing immediately follow the provocation without the reasonable opportunity for the passion to subside or cool?

D. Was there a causal connection between the killing, the provocation, the passion, and the fatal act?"

R. Gilbert and C. Moylan, Maryland Criminal Law Practice and Procedure, § 1.7-5 at 24 (1983).

Each of these questions can be answered in the negative in the case sub judice. Ergo, the trial judge did not err in refusing to instruct the jury concerning manslaughter. The crime of manslaughter was not an issue in the instant matter.

"VIII. Did the trial court commit reversible error in allowing demonstrative evidence to be presented before the jury without the laying of a proper foundation thereby denying the appellant's constitutional right of due process and a fair and impartial trial?"

Sherman challenges the trial court's decision permitting the State to introduce a box of shotgun shells, along with a paper bag that was provided to the buyer at the time the shells were purchased. The State presented the evidence in order to demonstrate to the jury that Sherman had the opportunity to buy shotgun shells just prior to the murders.

> "The rule is well established that physical evidence need not be positively connected with the accused or the crime to be admissible; it is admissible where there is a reasonable probability of its connection with the accused or the crime, the lack of positive identifi-

cation affects only the weight of the evidence."

Doye v. State, 16 Md. App. 511, 519 (1973), cert. denied, 268 Md. 747 (1973). Speaking through Judge Thompson, this Court noted, "It is also relevant to show that the defendant owned or had access to any article with which the crime was or could have been committed." Doye at 518, citing 1 Wharton, Criminal Evidence (12th ed.), § 203 at 408. The paper bag in question was offered into evidence on the basis of the testimony of several witnesses and a number of other items already in evidence. We think the evidence both relevant and admissible.

"IX. Did the trial court commit reversible error by violating the consti-

tutional rights of due process and fair and impartial trial when it conducted ex parte communication with the jury without the knowledge of the appellant?"

Sherman states that the trial judge erred when he engaged in an undisclosed ex parte communication with the jury. A juror described the trial judge's communication as follows:

> "Okay. What he did, come back and we were getting ready to go the motel, and somehow along the line, and I don't know the exact words, we were talking about the motel, and the overnight stay, and it came back as, you know, and he said that, you know, this was his first time, to bear with him, and he would work with us with the overnight stay, and then it was something said to the effect of the cost of or burden, cost of the taxpayers."

It is, of course, the better practice for judges to avoid contact with the jury other than that which the judge's official duty requires. A judge's innocent remark may be misinterpreted by a juror and might disadvantage either party

to the litigation. While we think the judge's comment to the jury ill advised, we, nevertheless, fail to see how the remarks prejudiced Sherman's case one iota. If there be any error, it was harmless beyond a reasonable doubt. Dorsey v. State, 276 Md. 638 (1976).

"X. Did the destruction of evidence by the State violate the appellant's constitutional rights?"

Finally, Sherman contends that the failure by the State to preserve the "bedding" upon which the bodies of the murder victims were found violated the discovery rules and the State's duty to produce exculpatory evidence under Brady v. Maryland, 373 U.S. 83 (1963).

Addressing a similar contention in DeLuca v. State, ____ Md. App. ____, No. 545, September Term, 1988, filed March 1, 1989, slip op. at 15, Judge Moylan penned: "Even if the State were grie-

vously at fault as alleged, that would do not more than lay the predicate for possible error by the trial judge." As in DeLuca, nowhere in the record are we pointed to any particular ruling by the trial judge that was allegedly erroneous. Sherman's claim is baseless.

JUDGMENTS AFFIRMED.

COSTS TO BE PAID BY APPELLANT.

APPENDIX B

TIMOTHY SCOTT SHERMAN	)	In the Court of Appeals of Maryland
v.	)	Petition Docket No. 285
STATE OF MARYLAND	)	September Term, 1989
	)	(No. 1491, September Term, 1988 Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answers and conditional cross-petition filed thereto in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition and conditional cross-petition be, and they are hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date:
October 20, 1989

APPENDIX C

TIMOTHY SCOTT SHERMAN	*	IN THE COURT OF
	*	APPEALS OF
v.		MARYLAND
	*	Petition Docket No. 285
	*	September Term, 1989
STATE OF MARYLAND	*	(No. 1491, September
	*	Term, 1989 Court of
	*	Special Appeals)

* * * * *

O R D E R

Upon consideration of the motion for reconsideration filed in the above entitled case, it is this 10th day of January, 1990

ORDERED, by the Court of Appeals of Maryland, that the motion be, and it is hereby, denied.

/s/ Robert C. Murphy

Chief Judge

(2)

No. 89-1580

Supreme Court, U.S.
FILED
JUN 21 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

TIMOTHY SCOTT SHERMAN,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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June 21, 1990

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

BEST AVAILABLE COPY

QUESTION PRESENTED

Did the Court of Special Appeals of Maryland correctly determine that a juror's driving by the crime scene during trial did not warrant Sherman's being granted a new trial?

PARTIES

The caption contains the names of all the parties below.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1580

TIMOTHY SCOTT SHERMAN,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

Respondent, the State of Maryland, respectfully requests that this Court decline to issue a writ of certiorari to review the judgment and unreported opinion of the Court of Special Appeals of Maryland.

OPINION BELOW

The unreported per curiam opinion of the Court of Special Appeals of Maryland is reprinted in the Appendix to the Petition.

STATEMENT OF JURISDICTION

The unreported opinion of the Court of Special Appeals of Maryland affirming Petitioner Timothy Scott Sherman's convictions was filed on May 16,

1989. Sherman filed a timely petition for writ of certiorari in the Court of Appeals of Maryland, and Maryland's highest appellate court denied the petition on October 20, 1989. Sherman then filed a petition for reconsideration of denial of petition for certiorari. The petition was denied by the Court of Appeals on January 10, 1990.

Sherman has invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a).

As explained more fully *infra*, a petition or motion for reconsideration of the denial of a petition for writ of certiorari is not recognized by the Maryland Rules of Procedure. Consequently, the time for filing a petition for writ of certiorari in this Court began to run from October 20, 1989, the date when the Court of Appeals of Maryland refused to exercise its discretionary power of review. Under this Court's former Rule 20.1, Sherman was required to file his petition for writ of certiorari within 60 days after October 20, 1989. Because Sherman's petition was filed on April 10, 1990, and not on or before December 19, 1989, the petition was untimely filed.

CONSTITUTIONAL PROVISIONS AND PROCEDURAL RULES INVOLVED

United States Constitution, Amendments VI and XIV are set forth in the Petition at 3.

Maryland Rule 8-604 provides in pertinent part:

> (a) Generally.—As to each party to an appeal, the Court shall dispose of an appeal in one of the following ways:
>
> (1) dismiss the appeal pursuant to Rule 8-602;

(2) affirm the judgment;

(3) vacate or reverse the judgment;

(4) modify the judgment;

(5) remand the action to a lower court in accordance with section (d) of this Rule; or

(6) an appropriate combination of the above.

Maryland Rule 8-605 provides in pertinent part:

(a) Motion; Response; No Oral Argument.—Except as otherwise provided in Rule 8-602(c), a party may file pursuant to this Rule a motion for reconsideration of a decision by the Court that disposes of the appeal. The motion shall be filed (1) before issuance of the mandate or (2) within 30 days after the filing of the opinion of the Court, whichever is earlier. A response to a motion for reconsideration may not be filed unless requested on behalf of the Court by at least one judge who concurred in the opinion or order. Except to make changes in the opinion that do not change the decision in the case, the Court ordinarily will not grant a motion for reconsideration unless it has requested a response. There shall be no oral argument on the motion.

* * *

(d) Disposition of Motion.—A motion for reconsideration shall be granted only with the consent of at least half the judges who con-

curred in the opinion. If a motion for reconsideration is granted, the Court may make a final disposition of the appeal without reargument, restore the appeal to the calendar for argument, or make other orders, including modification or clarification of its opinion, as the Court finds appropriate.

Maryland Rule 8-606 provides in pertinent part:

(a) To Evidence Order of the Court.—Any disposition of an appeal, including a voluntary dismissal, shall be evidenced by the mandate of the Court, which shall be certified by the Clerk under the seal of the Court and shall constitute the judgment of the Court.

STATEMENT OF THE CASE

At approximately 1:45 a.m. on Monday, October 12, 1987, deputies from the Harford County Sheriff's Department began arriving at the home of Stevenson, Ann, and Timothy Sherman. (Tr. 5/24/88, at 92). They found Stevenson and Ann Sherman lying dead in their bed; each had been killed by a shotgun. (Tr. 5/24/88, at 94; Tr. 5/25/88, at 7-18). In the hallway outside the victims' bedroom lay two expired Remington 12-gauge shotgun shells. (Tr. 5/24/88, at 93; Tr. 5/27/88, at 59). There were no signs of a forced entry or theft. (Tr. 5/24/88, at 71-76; Tr. 5/26/88, at 49-52). Although the doors and windows of the house were alarmed, the alarm switch in the house was in the "off" position. (Tr. 5/31/88, at 42-44).

Petitioner Timothy Scott Sherman, who, with his grandfather William Gibson, was at the crime scene when the deputies began to arrive, reported "that he

had no idea who it was that killed his Mom and Dad, but whoever it was, that his Dad was shot first and then he heard his Mom scream, and then they shot his Mom." (Tr. 5/24/88, at 93-94, 141). Sherman also reported that he was in bed when the shootings occurred and that, afterward, he dressed and ran to Gibson's house. (Tr. 5/24/88, at 94).

While his hands were being tested for gunshot primer residue, Sherman explained that he had been hunting the previous Saturday and had been reloading shells on Sunday afternoon. (Tr. 5/26/88, at 19). He also remarked and demonstrated that, when he fired a shotgun, he pulled the trigger with his middle finger and placed his index finger on the metal plate above the trigger guard. (Tr. 5/26/88, at 20-21).

Officers at the scene recovered a box of Remington 12-gauge shotgun shells from under the mattress of Timothy Sherman's bed. (Tr. 5/26/88, at 61-63; Tr. 5/31/88, at 52). The box, which was designed to hold five shotgun shells, contained three shells that matched the two expended shells found outside the victims' bedroom. (Tr. 5/25/88, at 80; Tr. 5/26/88, at 62; Tr. 5/27/88, at 63-64). During the morning of October 12, Sherman told Lieutenant James Isennock that he had purchased a box of shells on the day before and had fired his gun two times. (Tr. 5/25/88, at 39-41).

Hidden in a pine tree beside Gibson's house, deputies found a Stevens 12-gauge shotgun that belonged to the Shermans. (Tr. 5/24/88, at 53-58). The F.B.I.'s examination of this weapon disclosed that it had fired the two shells found in the hallway of the Shermans' home and that fingerprints on the weapon were those of Timothy Sherman. (Tr. 5/27/88, at 63;

Tr. 5/31/88, at 12-13). One of those prints was located above the trigger assembly. (Tr. 5/31/88, at 13).

By indictment filed in November, 1987, Sherman was charged with murdering his parents. (R. 6-8). Following a lengthy jury trial in the Circuit Court for Harford County, Maryland, Sherman was convicted of two counts of first degree murder. (Tr. 6/7/88, at 3-7). After the jury foreman's statement of the verdict was taken, each member of the jury was individually polled and each juror stated that Sherman was guilty of the first degree murder of Ann and Stevenson Sherman. (Tr. 6/7/88, at 3-7).

On September 2, 1988, the trial court heard argument and testimony in connection with Sherman's motion for new trial. (Tr. 9/2/88, at 3-70). Sherman had filed a new trial motion on June 16, 1988, in which he had alleged, *inter alia*, "[t]hat the jurors committed misconduct during the trial and deliberations." (R. 183-84). Despite this allegation, the defense did not learn, until the morning of September 2, that juror Blane Howard Miller Jr. had visited the scene during trial. (Cert. Pet. filed in Ct. App. of Md. at 8). Likewise, the State did not learn about Miller's visit until the morning of September 2, even though the State had interviewed Miller several days earlier in connection with another incident that formed a ground for Sherman's new trial motion. (Tr. 9/2/88, at 17-18).[1]

---

[1] Most of the testimony at the new trial hearing, including that of Miller, focused on whether the trial judge had had an *ex parte* communication with the jury after deliberations had begun. That issue is currently the subject of a State post-conviction proceeding.

At the hearing on September 2, Miller testified that, "two or three days into the case," he and his wife drove to the scene of the killings after the jury had been dismissed for the evening. (Tr. 9/2/88, at 16). In describing where he had gone, Miller stated: "I went to the Sherman house and then I drove back the streets from the Sherman house, back to the entrance of Gibson Manor in looking for a tree that was so involved in the case." (Tr. 9/2/88, at 16). Miller confirmed that he had seen both the house and the tree. (Tr. 9/2/88, at 16-17). During cross-examination, Miller acknowledged that he had visited the scene after having viewed a videotape of the outside of the Sherman house and pictures of the tree. (Tr. 9/2/88, at 25-26). Miller could not remember if his visit occurred after aerial and other photographs of the scene had been shown to the jury. (Tr. 9/2/88, at 25-26). He explained again that "the reason why I went there was so I could see the tree that was so much in question." (Tr. 9/2/88, at 26).

Following argument of counsel, during which the defense alluded generally to Sherman's Sixth Amendment rights and in particular to Sherman's Sixth Amendment right to a fair trial, (Tr. 9/2/88, at 48-62; *id.* at 56-60), the trial court stated, in part, "that I think that [Miller's] activity is not of such magnitude as to warrant a new trial or reversible appeal." (Tr. 9/2/88, at 64).[2] After also rejecting Sherman's other grounds for a new trial, the trial court sentenced Sherman to two consecutive terms of life imprisonment. (Tr. 9/2/88, at 157).

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[2] The full text of the trial court's ruling regarding Miller's visit to the scene is reproduced in the Petition at 18-19.

On appeal to the Court of Special Appeals of Maryland, Sherman attacked the trial court's failure to grant a new trial on account of Miller's crime scene visit. In the heading to his written argument, Sherman complained that "the trial court committed reversible error by violating the appellant's constitutional rights of due process in a fair and impartial trial by not granting the appellant's motion for a new trial." (Appellant's Brief at 25). In the text of his brief, Sherman claimed that Miller's conduct violated the juror's oath and the court's instructions regarding the evidence to be considered and sequestration. (Appellant's Brief at 26). Sherman suggested that it was an abuse of discretion for the trial court to have denied his motion for new trial, and that Miller's site visit could not be deemed harmless error. (Appellant's Brief at 26-27). The Court of Special Appeals rejected Sherman's contentions in an unreported opinion, saying:

> Sherman argues that the trial court should have granted a new trial because a juror and his wife drove to the neighborhood of the murder scene.
>
> When the precise extraneous matter is known but direct evidence as to its effect on the deliberations is not, "a sound balance is struck by a rule which looks to the probability of prejudice from the fact of extraneous matter in relation to the circumstances of the particular case." Wernsing v. General Motors Corp., 298 Md. 406, 419-20 (1984). When ruling on a motion for new trial, the judge must evaluate the degree of probable prejudice to

> the defendant in order to discern whether a new trial is justified. Wernsing at 420.
>
> The grant or denial of a motion for new trial rests within the sound discretion of the trial judge. Eades v. State, 75 Md. App. 411, 419-20 (1988). Judge Whitfill found that a new trial was not warranted, particularly in light of the numerous testimonial references, videotapes, and photographs relating to and depicting the crime scene. We perceive no abuse of discretion in that ruling.
>
> Sherman next alleges that there was a violation of the sequestration order because of the fact that the juror was accompanied by the juror's wife when he visited the crime scene. Sherman asserts that conduct mandates reversal. Sherman's bald averment fails to indicate how the juror's improper action prejudiced the case.

(Pet. App. 15a-17a).

In the petition for writ of certiorari that he filed in the Court of Appeals of Maryland, Sherman, without citation to either the Sixth or Fourteenth Amendments to the United States Constitution and with but one reference to a denial of an impartial jury, challenged the unreported decision of Maryland's intermediate appellate court on the issue of juror Miller's visit to the crime scene. (Cert. Pet. filed in Ct. App. of Md. at 8-10). The Court of Appeals of Maryland denied Sherman's petition on October 20, 1989. (Pet. App. 24a-25a). Thirty days later, Sherman filed a petition for reconsideration of denial of petition for certiorari. In this petition, Sherman claimed that Mill-

er's conduct deprived him "of his right to trial by an impartial jury, his right to confront the witnesses against him, his right to a fair trial, and his right to the assistance of counsel." (Pet. for Reconsideration at 19). This petition was denied on January 10, 1990. (Pet. App. 26a).

REASONS FOR DENYING THE WRIT

Sherman's petition for a writ of certiorari to review the judgment and unreported decision of Maryland's intermediate appellate court should be denied for any one of four reasons. Not only has Sherman failed to file his petition within the time requirements of this Court's procedural rules, his petition raises issues that were not raised or decided by the Court of Special Appeals of Maryland. Additionally, the *per se* rule of law that Sherman proposes as a standard for review is in conflict with relevant decisions of this Court. And, Sherman's alternative suggestion that the Court of Special Appeals required him to show actual prejudice is incorrect; the Court of Special Appeals correctly decided that Sherman was not entitled to a new trial. Accordingly, notwithstanding conflicts in the law on the subject of unauthorized crime scene visits by jurors, Sherman is not entitled to the relief that he claims has been erroneously withheld by the Maryland courts.

1. The petition for writ of certiorari is untimely.

The Court of Appeals of Maryland denied Sherman's petition for writ of certiorari on October 20, 1989. As of that date, former Rule 20 of this Court's Rules of Procedure was in effect. Paragraph .1 of that rule provided in relevant part that "[a] petition for writ of certiorari to review the judgment in a

criminal case of a state court of last resort . . . shall be deemed in time when it is filed with the Clerk within 60 days after the entry of such judgment." Under former Rule 20.1, then, the time for filing Sherman's petition began to run from the date the Court of Appeals denied discretionary review, and the time expired on December 19, 1989. *See American Railway Express Co. v. Levee*, 263 U.S. 19, 20-21 (1923) (where highest state court has discretion to review, but declines to do so, time for filing runs from date of refusal to review).[3]

Given that Sherman did not file his petition for writ of certiorari until April 10, 1990, he is apparently relying upon this Court's current Rule 13, paragraphs .1 and .4, and the fact that he filed, in the Court of Appeals, a petition for reconsideration of denial of petition for certiorari. The petition for reconsideration was denied by the Court of Appeals on January 10, 1990.

Rule 13.4, like former Rule 20.4, states in relevant part that "if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari . . . runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment." Assuming, without conceding, that a petition for reconsideration is otherwise a petition for rehearing

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[3] Current Rule 13.1 of this Court's Rules of Procedure seems to codify the language of the *Levee* case by providing in relevant part that "[a] petition for a writ of certiorari seeking review of a judgment of a lower state court which is subject to discretionary review by the state court of last resort shall be deemed in time when it is filed with the Clerk within 90 days after the entry of the order denying discretionary review."

within the meaning of Rule 13.4, the filing of Sherman's petition for reconsideration should not be viewed as extending the time for filing the instant petition for writ of certiorari.

Rule 8-605 of the Maryland Rules of Procedure does not expressly permit or preclude the filing of a motion for reconsideration of a denial of a petition for writ of certiorari. Rule 8-605 is, however, derived in part from a former rule that did expressly preclude a motion for reconsideration of a decision denying certiorari.[4] When new Rule 8-605 is read together with Rule 8-604, which addresses the subject of disposition, and Rule 8-606, which deals with the subject of mandates, there is no reason to conclude that new Rule 8-605 has effected a change in the previous Maryland practice of not permitting parties to seek reconsideration of the decision to deny certiorari.

Rule 8-605(a) speaks in terms of "a decision by the Court that disposes of the appeal." Rule 8-604(a) outlines the ways in which the Maryland appellate courts

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[4] Former Maryland Rule 850, which governed reconsideration of decisions of the Court of Appeals of Maryland, provided in pertinent part in subsection (a) that "[a] motion for reconsideration of a decision other than one granting or denying certiorari, specifying the grounds therefor, may be filed within thirty days after the opinion of this Court has been filed." Effective July 1, 1988, Rule 850 was rescinded, as were all Maryland Rules of Procedure pertaining to the Maryland Court of Appeals and the Court of Special Appeals. Like many of the new rules regarding procedure in the Maryland appellate courts, current Rule 8-605 governs reconsideration of decisions of both the Court of Appeals and the Court of Special Appeals, without distinguishing between the two appellate courts, and it replaces former rules that addressed the same subject matter, but which pertained to each appellate court individually.

"shall dispose of an appeal." Denial of a petition for writ of certiorari is not one of the six enumerated ways of disposing of an appeal. Rule 8-606(a), in turn, states that "[a]ny disposition of an appeal, including a voluntary dismissal, shall be evidenced by the mandate of the Court, which shall be certified by the Clerk under the seal of the Court and shall constitute the judgment of the Court." No mandate of the Court of Appeals is issued when that court denies a petition for writ of certiorari.

Because Maryland procedure does not contemplate a motion for reconsideration of a denial of certiorari, Sherman's petition for reconsideration and the order denying same should not be viewed as extending the time in which Sherman was required, under former Rule 20.1, to file his petition for writ of certiorari. Although the State recognizes that this Court may waive the untimely filing of a petition in a criminal case, *Schacht v. United States*, 398 U.S. 58, 63-64 (1970), there are no compelling reasons to countenance the untimely filing in the instant case. The Court should, therefore, decline to issue the requested writ of certiorari because Sherman's petition was untimely filed.

2. The petition raises issues that were not raised or decided in the Court of Special Appeals.

On page 22 of his petition in this Court, Sherman asserts: "Although the courts below did not even acknowledge that Miller's site visit amounted to a deprivation of Timmy Sherman's federal constitutional rights, in fact there can be no doubt that such an escapade violates the defendant's federal rights of confrontation, cross-examination, assistance of counsel, trial by an impartial jury, and due process."

To the extent that the lower courts failed to acknowledge the constitutional deprivations alleged in Sherman's petition, the omissions are directly attributable to Sherman's failure to raise such claims in the courts below.

In the trial court, although Sherman referred generally to his Sixth Amendment rights in several instances, in only one instance did Sherman elucidate what Sixth Amendment rights had been implicated. (Tr. 9/2/88, at 56-60). In that single instance, Sherman claimed that his "Sixth Amendment right to a fair trial" had been violated. (Tr. 9/2/88, at 57).

On appeal to the Court of Special Appeals of Maryland, Sherman was even more cryptic than he had been in the trial court. In his brief's argument heading relating to Miller's visit, Sherman suggested that "the trial court committed reversible error by violating the appellant's constitutional rights of due process in a fair and impartial trial." (Appellant's Brief at 25). Sherman's substantive argument spoke of Miller's conduct as having violated the juror's oath, the court's instructions, and the court's sequestration orders. (Appellant's Brief at 26). Sherman also argued about adverse prejudice to the defendant, an abuse of discretion in the denial of the new trial motion, and the inability of the State to prove harmless error. (Appellant's Brief at 27). At no time did Sherman allege the constitutional violations catalogued on page 22 of his instant petition. (Appellant's Brief at 25-28).

In *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970), this Court declined to consider an issue of trial court error that was raised in Adickes's petition for certiorari, but which had not been raised in or ruled on by the Court of Appeals. Here, where

Sherman claims violations of constitutional rights, *e.g.*, confrontation, cross-examination, assistance of counsel, that were never brought to the attention of the court whose judgment would form the basis of review, this Court should decline to grant the over-inclusive petition for certiorari.

3. The proposed standard of automatic reversal conflicts with decisions of this Court.

Sherman's first contention for why this Court should issue a writ of certiorari is that the Court of Special Appeals' decision conflicts with the decisions of several state courts of last resort. (Pet. at 26-35). In this regard, Sherman suggests that, as have some lower courts, "[t]his Court should adopt, as a matter of federal constitutional law, the rule that an unauthorized visit by a juror to a crime scene whose physical description is in issue automatically mandates reversal." (Pet. at 34-35).

The fallacy of Sherman's contention, and that which militates against review by this Court, is that decisions of this Court involving analogous situations suggest that a *per se* rule of reversal is not constitutionally mandated. *See Smith v. Phillips*, 455 U.S. 209, 215 (1982) ("[t]his Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias"); *Remmer v. United States*, 347 U.S. 227, 229 (1954) (although an attempt to bribe a juror is presumptively prejudicial, "the presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant").

Accordingly, even if the unreported decision of the Court of Special Appeals, which decision "is neither precedent within the rule of stare decisis nor persuasive authority," Md. Rule 8-114(a),[5] can be said to conflict with the decisions of other state courts, the rule of law espoused by these other courts is inconsistent with decisions of this Court. Accordingly, the perceived conflict in state court decisions does not provide an appropriate basis for granting Sherman's petition for writ of certiorari.

4. The Court of Special Appeals correctly resolved the issues before it.

In his second argument for why this Court should grant his petition for certiorari, Sherman challenges the standard by which the Court of Special Appeals analyzed his contentions in that court, saying that it conflicts with the standards applied by other lower

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[5] Maryland Rule 8-114 provides in full as follows:

> (a) Not Authority.—An unreported opinion of the Court of Appeals or Court of Special Appeals is neither precedent within the rule of stare decisis nor persuasive authority.
>
> (b) Citation.—An unreported opinion of either Court may be cited in either Court for any purpose other than as precedent within the rule of stare decisis or as persuasive authority. In any other court, an unreported opinion of either Court may be cited only (1) when relevant under the doctrine of the law of the case, res judicata, or collateral estoppel, (2) in a criminal action or related proceeding involving the same defendant, or (3) in a disciplinary action involving the same respondent. A party who cites an unreported opinion shall attach a copy of it to the pleading, brief, or paper in which it is cited.

courts. (Pet. at 35-53). For example, on page 36 of his petition, Sherman argues as follows: "Constitutional error was indisputably shown in this case, yet the burden was placed on the defendant to show prejudice from the error, not on the State to rebut it." Although a conflict regarding standards may exist, Sherman is mistaken in his contention that the Court of Special Appeals incorrectly resolved the issues before it.

A fair reading of the Court of Special Appeals' decision suggests that the first three paragraphs of the opinion address the contention that Miller's site visit deprived Sherman of a fair trial. The last paragraph of the opinion deals with the separate issue of whether Miller's visit to the scene with his wife violated the trial court's sequestration order. Only with respect to this latter issue, which is not a subject of Sherman's petition in this Court and which in any event is a matter best left to state courts to resolve,[6] did the Court of Special Appeals impose upon Sherman the burden of showing prejudice.

Although its decision as it relates to Sherman's fair trial contention is terse, the Court of Special Appeals' citation to *Eades v. State*, 75 Md. App. 411, 541 A.2d 1001, *cert. denied*, 313 Md. 611, 547 A.2d 188 (1988), demonstrates that the court properly analyzed, albeit implicitly, the issue before it. In the *Eades* case, which was decided less than a year before Sherman's case,

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[6] It is the long-standing policy of this Court to accord great deference to a state's establishment and implementation of criminal trial procedures. *E.g.*, *Marshall v. Lonberger*, 459 U.S. 422, 438 n. 6 (1983); *Chambers v. Mississippi*, 410 U.S. 284, 302-03 (1973).

the Court of Special Appeals had engaged in a comprehensive review of the law pertaining to juror misconduct and extraneous influences on the jury. *Id.* at 416-25, 541 A.2d at 1004-08. In recognizing that a motion for a new trial is committed to the sound discretion of the trial judge, the Court of Special Appeals also acknowledged that, where misconduct is at issue,

> the trial judge must account for the fact that due process requires "a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen."

Id. at 420, 541 A.2d at 1006 (quoting *Smith v. Phillips*, 455 U.S. at 217). The intermediate appellate court also acknowledged that "a motion for mistrial or a new trial because of alleged jury misconduct will be granted if the misconduct was such as to indicate that a fair and impartial trial could not be had under the circumstances." *Id.*, 541 A.2d at 1006. All of the above-quoted language appears on the pages of the *Eades* opinion that the court refers to in its decision in the instant case. (Pet. App. 16a).

In *Eades*, the Court of Special Appeals went on to discuss various standards that have been used by different courts to determine whether prejudice has resulted when an irregularity has occurred.[7] It

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[7] In *Eades*, one of the jurors had asked her lawyer-husband why it was that the judge had said that a witness could say what she had. The husband had explained that the witness's statement was a spontaneous utterance. 75 Md. App. at 415, 541 A.2d at 1003-04.

ultimately chose to "assume that the Supreme Court's holding in *Remmer* as to the presumptively prejudicial effect of any private communication with a juror concerning a matter pending before the jury remains the law." 75 Md. App. at 423, 541 A.2d at 1008. In a subsequent discussion regarding which party bears the burden when the problem of improper juror contact is raised, the court again assumed that it is the State that bears the burden of establishing the harmlessness of the contact beyond a reasonable doubt. *Id.* at 425-26 n. 4, 541 A.2d at 1008-09 n. 4.

Although the Court of Special Appeals did not, in its decision of the instant case, expressly refer to the standards it had applied in the *Eades* case, it is reasonable to believe that the court was aware of these standards and that it considered them in conjunction with the language regarding "the degree of probable prejudice" that it quoted from Maryland's high court's decision in *Wernsing v. General Motors Corp.*, 298 Md. 406, 419-20, 470 A.2d 802, 809 (1984). Consequently, it is *not* reasonable to believe, as Sherman suggests in his petition, that the Court of Special Appeals imposed a burden upon him to prove that he had been prejudiced. Indeed, the Court of Special Appeals' reliance upon *Eades* and *Wernsing* suggests that the court affirmed the trial court's denial of Sherman's new trial motion only after it was persuaded that the State had established that probable prejudice to Sherman had not occurred beyond a reasonable doubt. Such a standard is not significantly different from the alternate standard proposed by Sherman. Furthermore, assuming that such a standard is to be applied, despite language in *Smith v. Phillips* that suggests that a less stringent standard

is appropriate, 455 U.S. at 215, the record before the Court of Special Appeals reveals that the court's resolution of the issues before it was correct.

As both the trial court and the Court of Special Appeals recognized, the view of the scene was cumulative of evidence introduced at trial. (Tr. 9/2/88, at 63-64; Pet. App. 16a). Given Miller's description of what he did during the site visit, there is nothing to suggest that Miller did more than drive by the house and the tree. There is also nothing to suggest that Miller considered or discussed his observations during deliberations.[8]

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[8] At various points in his petition, Sherman refers to his not being permitted to adduce certain testimony from Miller. (*E.g.*, Pet. at 16 & nn. 3 & 4; 47-48 n. 14; 49). To the extent that Sherman is suggesting error in this regard, his contention is without merit.

First, although the State consistently maintained in the State courts that Miller should not have been permitted to testify about his conduct, both the trial court and the Court of Special Appeals considered the substance of Miller's evidence.

Second, although the State also objected, at the new trial hearing, to allowing the defense to ask Miller why he went to the scene, on direct examination Miller explained that he was "looking for a tree that was so involved in the case," and on cross-examination Miller said he had gone to the scene "so I could see the tree that was so much in question." (Tr. 9/2/88, at 16, 26). And, when the State objected to the defense's asking Miller if what he had seen had influenced his deliberations, defense counsel withdrew his question. (Tr. 9/2/88, at 17-18).

Finally, under Maryland law, "the question of whether the exclusion of evidence is erroneous and constitutes prejudicial error is not properly preserved for appellate review unless there has been a formal proffer of what the contents and relevance of the excluded testimony would have been." *Mack v. State*, 300

In sum, when the Court of Special Appeals' decision is viewed in the context of the cases that the court relied upon and the facts before it, Sherman's criticisms of the decision necessarily dissipate, and the reasons for granting certiorari disappear. Accordingly, this Court should decline to grant the petition for writ of certiorari for the additional reason that the Court of Special Appeals correctly affirmed the trial court's decision to deny Sherman a new trial.

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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Md. 583, 603, 479 A.2d 1344, 1354 (1984). No proffers were made as to any further reasons Miller had for going to the scene or as to whether Miller, alone or with other jurors, considered his site visit during deliberations.

Supreme Court, U.S.
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CLERK

(3)

No. 89-1580

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

TIMOTHY SCOTT SHERMAN, PETITIONER

v.

STATE OF MARYLAND, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The State's brief in opposition makes no effort to deny that numerous state courts of last resort would have reversed the conviction in this case. Indeed, the State concedes that there are "conflicts in the law on the subject of unauthorized crime scene visits by jurors" (Br. in Opp. 10) and that the decision below "can be said to conflict with the decisions of other state courts" (id. at 16), and that "a conflict regarding standards may exist" (id. at 17). The State grasps at straws in its effort to avoid the force of those concessions by persuading this Court that it should deny certiorari regardless of the merits of petitioner's claim. Thus, the State incorrectly argues that the petition is untimely; that the issues presented by

the petition were not raised below; that plainly inapposite decisions of this Court should be treated as controlling notwithstanding the numerous decisions of lower courts that have correctly reached a result different from the one that the State claims has been dictated by this Court; and that this Court should ignore the sharp conflict among lower courts because the decision below is "correct." None of those arguments offers a tenable basis for denying review.

1. The State argues (Br. in Opp. 2, 10-13) that the petition for a writ of certiorari is untimely. Although the State hints at other arguments,1/ the

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1/ The State implies (Br. in Opp. 11-12) that there may be some question about whether a petition for reconsideration is a "petition for rehearing" within the meaning of this Court's Rule 13.4. The State refrains, however, from actually making the plainly frivolous argument that Rule 13.4, which was designed to deal with cases com-
(Cont'd)

only timeliness argument that the State actually makes is that there is no procedure for seeking reconsideration of the denial of certiorari by the Maryland Court of Appeals. Therefore, the State argues, the time for seeking certiorari from this Court was not tolled while the Maryland Court of Appeals considered petitioner's petition for reconsideration.

The State's argument is wrong. The State cannot point to a single Maryland case stating that a petition for reconsideration of the denial of state certiorari is an unauthorized filing, and our own research has disclosed no such

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ing from the federal courts of appeals and the courts of more than 50 distinct state and territorial legal systems, tolls the time for filing a petition for a writ of certiorari if and only if practice in the relevant system requires that litigants denominate their reconsideration requests as "petitions for rehearing."

case. The State relies instead on the absence of express authorization for such a petition in the current Maryland Rules and on a tenuous inference from a former Maryland rule that excluded denials of certiorari from the express authorization of motions for reconsideration.

The State's effort to read between the lines of present and former rules, however, is contradicted by the case law of the Maryland Court of Appeals, the case law of this Court, and the day-to-day practice of the Maryland Court of Appeals.

To begin with, at least two recent Maryland cases refer to motions for reconsideration of denial of certiorari. See, e.g., Sherman v. Robinson, 319 Md. 445, 447 n.1, 573 A.2d 34, 35 (1990) (discussing this case: "[Timothy Sherman's] petition was denied October 10

[sic], 1989, as was his subsequent request for a reconsideration of the denial"); State v. Gorman, 315 Md. 402, 554 A.2d 1203, 1204 (1989) ("[t]his Court denied Gorman's petition for a writ of certiorari and denied his motion for reconsideration"). Neither of those cases contains any hint that such motions should not be filed, should not be received for filing, or are not considered on their merits. To the contrary, the Maryland Court of Appeals consistently denies -- rather than dismisses -- motions for reconsideration that it rejects. See Pet. App. 26a. As this Court recently stated in Missouri v. Jenkins, 110 S. Ct. 1651, 1662 (1990), in rejecting a technical argument much like Maryland's in this case: "The Eighth Circuit surely knows more than we do about the meaning of its orders, and we accept its

action for what it purports to be.". Here, the state court's action purports to be a denial on the merits, not a dismissal of an unauthorized filing.

Moreover, this Court has on at least one recent occasion granted a petition for a writ of certiorari in a case in which that petition was filed in this Court more than 60 days (see former Rule 20.1) after the denial of certiorari by the Maryland Court of Appeals but within 60 days after the Maryland court's denial of reconsideration of the denial of certiorari. Gorman v. Maryland, 480 U.S. 913 (1987) (No. 86-5699) (order granting the petition, vacating, and remanding for further consideration). That case arose before the current Maryland Rules took effect, and this Court's grant of certiorari suggests that the State is wrong even in its interpretation of the previ-

ous Maryland Rules. Certainly the Maryland Court of Appeals, on remand (State v. Gorman, supra), expressed no surprise that a petition for reconsideration of a denial of (state) certiorari had been filed and had been treated by this Court as tolling the time to seek (federal) certiorari.

Finally, the only available evidence we have, other than case law, of the day-to-day operations of the Maryland Court of Appeals suggests that the court routinely accepts petitions for reconsideration of denials of certiorari. On November 8, 1989, counsel for petitioner telephoned the clerk's office of the Maryland Court of Appeals specifically to inquire about the procedure for filing a petition for reconsideration of a denial of certiorari. The telephone call was referred to a Mrs. Hughes, who informed counsel

that such a petition is due within 30 days after the denial of certiorari and must be accompanied by a $25 filing fee. It is inconceivable that there would be an established filing fee for an unauthorized filing.2/

For these reasons, it is clear that the petition for reconsideration of the denial of certiorari in the Maryland Court of Appeals, although not specifically authorized by rule, was in fact an authorized pleading, treated as such by the Maryland Court of Appeals. It there-

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2/ Thus, counsel's good-faith reliance on the advice given by the Maryland Court of Appeals clerk's office would constitute "compelling reasons to countenance the untimely filing" (Br. in Opp. 13) even if the filing were untimely -- which it is not. As the State properly concedes (ibid.), the time for filing a petition for a writ of certiorari in a criminal case is not jurisdictional, and this Court could grant the petition for a writ of certiorari (and correct a very serious injustice) even if it believed the petition to be untimely.

fore tolled the time for petitioning for a writ of certiorari in this Court. The present petition for a writ of certiorari is timely and should be considered on its merits.

2. The State argues that petitioner did not sufficiently raise below the issues presented in the petition. Br. in Opp. 13-15. The State concedes, as it must, that petitioner couched his arguments below in terms of the Sixth Amendment to the Federal Constitution.3/ The State regards that as insufficient, however, on the ground that petitioner was not as specific in the courts below as he

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3/ The State neglects, however, to mention that the petition for reconsideration filed in the Maryland Court of Appeals recited much the same litany of constitutional rights as the present petition for a writ of certiorari. The scope of federal constitutional issues raised in a petition for rehearing is significant. Hathorn v. Lovorn, 457 U.S. 255, 262-265 (1982).

is here in enumerating the specific Sixth Amendment rights violated. The argument is utterly frivolous.

To begin with, the question before this Court is not whether petitioner's federal constitutional rights were violated, for the State does not and could not contest that it violates a criminal defendant's federal constitutional rights for a juror to make an unsupervised visit to the crime scene. See Pet. 21-25 & n.5; cf. Br. in Opp. 15-21 (discussing merits of the issue without ever denying that a constitutional violation occurred in this case). The single question raised by the petition is one of remedy: Given that a constitutional violation occurred, did the courts below properly conclude that petitioner was nevertheless not entitled to a new trial? Our petition, like the scores of cases on

which it relies, contains no elaborate discussion of the precise nature of the Sixth Amendment (and other federal constitutional) rights violated, but rather focuses on the proper cure for violation of those rights. Likewise, petitioner's briefs and arguments below cited the relevant federal constitutional provisions and then moved quickly on to the remedies question.4/ In these circumstances, the idea that the general references to the Sixth Amendment in the courts below did not suffice to preserve the issue is wholly untenable.

4/ At page 26 of his brief in the Court of Special Appeals, in arguing that the juror's site visit was reversible error, petitioner cited Smith v. Phillips, 455 U.S. 209 (1982). At page 27, in the course of the same argument, he cited Tanner v. United States, 483 U.S. 107 (1987); Mattox v. United States, 146 U.S. 240 (1892); and the Fifth, Sixth, and Fourteenth Amendments. The state court was amply on notice of the federal constitutional nature of petitioner's claim.

In any event, this Court has consistently distinguished cases in which the issue was not raised at all in lower courts -- in which cases review of the issue generally is barred -- from cases in which the issue was preserved but simply not elaborated. In the latter class of cases, this Court regularly has proceeded to review the issue on its merits. See, e.g., Taylor v. Illinois, 484 U.S. 400, 406-407 n.9 (1988) (Compulsory Process Clause claim sufficiently preserved by allegation of "constitutional" error and citations to decisions relying on Compulsory Process Clause); Eddings v. Oklahoma, 455 U.S. 104, 114 n.9 (1982) ("[o]ur jurisdiction does not depend on citation to book and verse"); cf. Webb v. Webb, 451 U.S. 493, 496 (1981) (issue not preserved when petitioner did not cite Federal Constitution

or any cases relying on the Full Faith and Credit Clause).

3. The State does not dispute in the slightest our contention that the decision below squarely conflicts with People v. DeLucia, 20 N.Y.2d 275, 282 N.Y.S.2d 526, 229 N.E.2d 211 (1967) (and subsequent New York cases); Watkins v. State, 237 Ga. 678, 229 S.E.2d 465 (1976); and Commonwealth v. Price, 463 Pa. 200, 203-204, 344 A.2d 493, 494 (1975). It instead asks the Court to ignore the conflict by summarily rejecting the considered constitutional holdings of those courts as being inconsistent with the decisions of this Court in Remmer v. United States, 347 U.S. 227 (1954), and Smith v. Phillips, 455 U.S. 209 (1982). Br. in Opp. 15-16.5/

5/ It is more than a little surprising that the (Cont'd)

The State's argument misconstrues both the role of this Court in granting certiorari and the holdings of Remmer and Smith. This Court grants certiorari in order to determine which of two or more competing rules adopted in the lower courts better comports with the requirements of the Constitution as interpreted by this Court. Where, as here, the existence of a conflict is undeniable, a claim that the rule adopted by the highest courts of three States is inconsistent with this Court's precedents is no basis at all for denying certiorari.

State should invoke Remmer as a case supporting the denial of certiorari. Remmer requires that the government rebut a heavy presumption of prejudice (347 U.S. at 229), but the State does not and could not argue that any such presumption was applied in this case. See Pet. 17-21, 47-50. If the State means to suggest that Remmer's heavy presumption of prejudice was overruled by Smith v. Phillips, then the State has raised as issue on which the federal courts of appeals are in conflict, with the vast majority disagreeing with the State's position (see Pet. 51 & n.15).

Indeed, if the State were right (which it is not) that such a misunderstanding of this Court's precedents by the lower courts exist, that would be in and of itself a reason favoring a grant of certiorari in order to clear up the confusion.

Furthermore, neither Remmer nor Smith even remotely rejects a rule of automatic reversal whenever a juror makes an unauthorized visit to a crime scene whose physical description is in issue. See Pet. 34-35 & n.8. Indeed, neither Remmer nor Smith involved a crime scene visit. In Remmer, there was a communication by an outside person with a juror. Smith -- which is not a Sixth Amendment case at all -- involved potential juror bias shown by the juror's submission of an employment application to the prosecutor's office during the trial. Neither

case involved the unsupervised and intentional gathering of evidence by the juror by means outside the adversary process. Thus, the cases on which the State relies neither raised nor could have raised the inference (which we submit should be conclusive) that the juror's actions, by themselves, prove that the juror acted prejudicially by seeking information that the court or the parties chose not to submit, but that the juror thought it necessary to obtain before rendering a verdict. In short, the rule adopted by the New York, Pennsylvania, and Georgia courts in cases of this sort is fully consistent with the rules -- applicable to somewhat different situations -- followed in Remmer and Smith.

4. The State's last effort to defeat certiorari is an assertion that the decision below comported with proper

constitutional standards. Br. in Opp. 16-21. That assertion consists of a claim that the court below did in fact require the State to demonstrate the absence of prejudice (id. at 17-20) and a rehash of the State's reasons for claiming, although there is no evidence at all on the subject, that it met that burden (id. at 20). As to the latter point, we have already discussed in the petition (at 16-17, 19, 48-50) the reasons why a no-prejudice determination is simply impossible in this case if the burden is placed, as the State apparently concedes it should be (Br. in Opp. 19), on the State to disprove prejudice beyond a reasonable doubt. The State has raised nothing new and we will not elaborate the point further.

It is necessary, however, to respond to the State's insupportable contention

that the burden of proof was properly placed in this case. The opinion of the court below makes absolutely no reference to putting the burden of proof on the State; instead, it contains a single paragraph discussing prejudice followed by a single paragraph discussing the abuse-of-discretion standard. Pet. App. 15a-16a; see Br. in Opp. 8-9. The "prejudice" paragraph cites only one (civil) case -- Wernsing v. General Motors Corp., 298 Md. 406, 470 A.2d 802 (1984) -- and in that case the Maryland Court of Appeals explicitly "reject[ed] the rule which presumes prejudice." Id. at 416, 470 A.2d at 807. The case on which the State relies heavily (Br. in Opp. 17-19) -- Eades v. State, 75 Md. App. 411, 541 A.2d 1001, cert. denied, 313 Md. 611, 547 A.2d 188 (1988) -- is not cited in the "prejudice" paragraph, but only in the

"abuse of discretion" paragraph, and there solely and expressly for the proposition that "[t]he grant or denial of a motion for new trial rests within the sound discretion of the trial judge." Pet. App. 16a.6/ It is abundantly clear that the court did not derive its prejudice test from Eades, but, to the extent it applied any test at all (other than abuse of discretion), derived that test from Wernsing, which rejects a presumption of prejudice.

Aside from any inferences that may be drawn from the cases that the court cited, it is crystal clear from the opin-

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6/ Reviewing the trial court's determination only for abuse of discretion in a case of this sort is itself error of constitutional dimension, as the Ninth Circuit has held. See Pet. 42 (citing Marino v. Vasquez, 812 F.2d 499, 504-507 (9th Cir. 1987)); see also Remmer v. United States, 350 U.S. 377 (1956) (unanimously finding prejudice despite contrary determination of the trial court).

ion that the court below did not require the State to rebut any presumption of prejudice. The court's review of this point was cursory and characterized by deference to the trial judge, who in turn had denied petitioner's new trial motion without any substantive input from the State. Furthermore, the facts discussed in the petition show that only a mockery of the presumption of prejudice would allow a determination of successful rebuttal in this case. The State's "rebuttal" of the presumption consists of nothing more than the assertion that the evidence gathered by the errant juror was "cumulative." Br. in Opp. 20. To say that such an unelaborated assertion rebuts the presumption of prejudice is to say that there is no presumption at all. That is not the law.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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